IN THE

Supreme Court of the United States

..... Term, 1978

No. 77-1480

JOSEPH IANNELLI and
NORMA IANNELLI,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

Statutes—Other Authorities.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Your petitioners, JOSEPH IANNELLI and NORMA IANNELLI, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit entered in the above-captioned case.

OPINIONS BELOW

No opinions were rendered by the Court of Appeals or by the District Court. A judgment order of the Court of Appeals, affirming the District Court's judgment of conviction, is not yet reported but is set forth herein at "Appendix A". The Court of Appeals' order denying the petition for rehearing is not yet reported but is set forth herein at "Appendix B".

JURISDICTION

The judgment order of the Court of Appeals was filed on February 22, 1978. A petition for rehearing was denied on March 22, 1978. Pursuant to Rule 22 of the Rules of this Honorable Court, the within Petition for Writ of Certiorari is being filed within thirty (30) days after the entry of the Court of Appeals' final order.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

I.

Whether "gross revenue of $2,000 in any single day", a necessary element of an illegal gambling business under U.S.C. §1955, must be proven by evidence of the amount of monies won by the business and not simply by the amount of monies wagered with the business?

II.

In determining whether the government's application for the interception of wire communications establishes the need for interception required by 18 U.S.C. §2518(1)(c) and (3)(c), may the court consider affidavits submitted in connection with a previous application?

STATUTES INVOLVED

The statutory provisions involved, 18 U.S.C. §1955 and 18 U.S.C. §2518(1)(c) and (3)(c), are set forth at "Appendix C", *infra*.

STATEMENT OF THE CASE

On June 13, 1975, the Federal Bureau of Investigation began court-authorized interception of incoming and outgoing telephone calls over four telephones located in the United States Post Office in downtown Pittsburgh, Pennsylvania, and two telephones located in private residences. One of those two telephones was located in the home of petitioners Joseph and Norma Iannelli, husband and wife. On July 23, 1975, the Federal Bureau of Investigation began court-authorized interception of incoming and outgoing telephone calls over two telephones located in the residence of co-defendant John Harkins.

On February 10, 1977, petitioners and ten other individuals were indicted and charged in two counts with operating a sports gambling business in violation of 18 U.S.C. §1955 and §371.

On May 9, 1977, after extensive pre-trial proceedings, the case came on for trial before Chief District Judge Gerald J. Weber and a jury. Immediately prior to trial, the government dismissed the charges against defendants John Deep and Charles J. Kelly. Defendant Theodore Michenzi entered a guilty plea to count two.

The government's entire case was based upon the evidence disclosed by the court-authorized interceptions. That evidence was interpreted for the jury by FBI Agent William Holmes, a purported gambling expert.

At the close of the government's case, a judgment of acquittal was granted as to defendant Louis Ciancutti. The defendants then presented the testimony of Sherman Goldman, a Chicago bookmaker who had reviewed the intercepted phone conversations relied upon

by the government. It was his opinion that the government's evidence showed that only four of the defendants (Harkins, the Iannellis and Felix Gnazzo) were engaged in the gambling business charged in the indictment.

On May 26, 1977, the jury returned verdicts of guilty as to all remaining defendants except William T. McCullough who was acquitted on both counts.

On July 8, 1977, petitioner Joseph Iannelli was sentenced to three (3) years imprisonment and a $5,000.00 committed fine. Petitioner Norma Iannelli was sentenced to three (3) years imprisonment of which she is to be confined for a period of thirty (30) days and to be placed on probation for two (2) years and eleven (11) months; she was also ordered to pay a $1,000.00 fine.

The judgment of sentence was affirmed by the United States Court of Appeals for the Third Circuit on February 22, 1978; a petition for rehearing was denied on March 22, 1978. The within Petition for Writ of Certiorari follows.

Additional facts, as they are relevant, are discussed below.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

Petitioners Joseph and Norma Iannelli pose an important question of federal law which has not been, but should be, settled by this Court. They ask this Court to determine whether "gross revenue of $2,000 in any single day", a necessary element of an illegal gambling business under 18 U.S.C. §1955[1], must be proven by evidence of the amount of monies won by the business and not simply by the amount of monies wagered with the business.

In both counts one (1) and two (2) of the instant indictment, petitioners Iannelli are alleged to have been involved in an illegal gambling business which had a "gross revenue of $2,000 or more on one or more single days" in violation of 18 U.S.C. §1955. In the lower court, the Iannellis contended that the government failed to prove this specific allegation and that the evidence pre-

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1. 18 U.S.C. §1955 is entitled "Prohibition of illegal gambling businesses" and states in pertinent part as follows:

> "(1) 'Illegal gambling business' means a gambling business which—
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day."

sented was not sufficient to sustain the verdict against them. As this Court has held, "... [t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged". *In Re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970). Here, petitioners argued that they were convicted of the offenses alleged in the indictment without proof of each fact necessary to constitute those particular offenses.

In an attempt to show that the gambling business in question had a gross revenue of $2,000.00 or more on certain days, the government introduced evidence derived from monitored telephone conversations. Special Agent William L. Holmes of the FBI, who testified for the government as an expert in gambling, analyzed these conversations and determined the amounts of money wagered by bettors over the Iannelli and Harkins (a co-defendant) telephones on two given days. His testmony was as follows:

"Q: Now with regard to the first series of monitored conversations, those dealing with the Iannelli telephone, telephone number—area code 412—766-0714, did you analyze off of those monitored conversations one day's worth of wagers, and were you able to determine what the amounts wagered were?
"A: Yes, sir.
"Q: Would you detail now the day that you analyzed and the amounts wagered on that day?
"A: On 6/23, 1975, the total amount wagered was $13,673.00.

"Q: On the Iannelli telephone?
"A: Yes, sir.
"Q: Now with respect to the total wagers accepted during a one-day period on the two telephones being operated by John Harkins, Hymie, telephone numbers—area code 412—931-0384 and area code 412—931-0575, did you analyze one day off of those two telephones?
"A: Yes, sir.
"Q: And which day was that?
"A: On 7/26, 1975.
"Q: And as a result of that analysis, were you able to determine the amount wagered for that one-day period off of those two telephones?
"A: Yes, sir, I did.
"Q: And what amount was that?
"A: $62,920.00"

(pp. 225a—226a—"a" refers to the appendix filed by petitioners in the lower court)

Said testimony concerning amounts of money wagered by bettors on sporting events was offered to prove the gambling business had a "gross revenue of $2,000.00 or more on one or more single days". Petitioners argue that "amounts wagered" is not the correct measure of gross revenue and that evidence of same is inadequate to prove the gambling business met the $2,000.00 a day criterion required both by statute and by the specific allegation in the indictment.[2]

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2. As noted above, the grand jury returned an indictment charging involvement in a gambling business which had a gross revenue of $2,000.00 or more on one or more single days. This indictment must remain the same as that returned by the grand jury and may not

In *United States v. Ceraso,* 467 F.2d 653 (3rd Cir., 1972), the defendant claimed that gross revenue was net profit. The Third Circuit rejected the claim, pointing to the inordinate burden such a construction would place on the government; the bookmaker's "carefully secreted" records would have to be introduced to prove his expenses. 467 F.2d 657. Petitioners agree that gross revenue is not net profit, *but they object strenuously to the interpretation of gross revenue as the total amount wagered.*

Revenue means income; gross revenue is total income before expenses.[3] It cannot be simply the amount wagered because there may not be any income derived by the gambling business from the wager itself. When Congress enacted 18 USC §1955 and thereby asserted its power to regulate gambling, it did so on the premise that the money derived therefrom flows in interstate commerce. See 84 Stat. 936; and Remarks of Senator Hruska, 115 Cong. Rec. 10736 (1969) quoted in *United States v. Ceraso, supra,* at 657. However, no money can flow from an amount wagered, only from an amount won. In the case of sports betting, no money changes hands, no obligation to pay occurs, until the completion of the particular game on which the wager has been made. When the bookmaker wins, he is paid by the

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become, through interpolation or amendment, the indictment of a prosecutor or court. *Ex Parte Bain,* 121 U. S. 1, 7 S. Ct. 781 (1887); *Stirone v. United States,* 361 U. S. 212, 80 S. Ct. 270 (1960). Accordingly, the government's burden must include proof beyond a reasonable doubt of the specified gross revenue.

3. See *Black's Law Dictionary,* 1482 (4th Ed. Rev. 1968); *The Random House College Dictionary,* 1129 (Rev. Ed. 1975).

bettor. This is gross revenue. It is simply the total amount won, excluding losses and other expenses, and can easily be determined by comparing the wagers made with the scores of the games they were made on. There is no burden on the government, no carefully secreted records to find. It need only look at a newspaper to find which games the bookmaker has won, and tally his winnings.

This is best illustrated by a review of the portion of the record wherein counsel cross-examined government expert Holmes concerning the telephone conversation on June 20, 1975, at 7:31 P.M. between co-defendant Gnazzo and Joseph Iannelli during which the former is placing bets with the latter (p. 384a). Each bet is explained as to the amount wagered, the type of bet and the team picked to win on that day. The expert testified that the bets made during this conversation were representative of the typical sports bookmaking activity in regard to baseball. He testified that the following elements, among others, were critical to a sports bookmaking operation: line information, credit, the occurrence of the sporting event and the final score of the event. Also, in baseball, if a specific pitcher does not pitch the game bet on, the bet is cancelled. Likewise, if the game is not played or terminates before eight innings elapse, then the bet is cancelled (p. 182a).[4] The expert further explained that it is necessary for the bookmaker to know who won and who lost in order to determine whether he profits from a bet. The expert was then shown a portion of a newspaper dated June 21, 1975, which listed the scores from the baseball

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4. See also the testimony of defense expert Sherman Goldman at p. 589a.

games played on June 20, 1975 (Defendants' Exhibit F). Referring to each of the bets placed during the telephone conversation of June 20, 1975, at 7:31 P.M., between Gnazzo and Iannelli, the expert determined that the scores resulted in each bet being a win for the bettor and a loss to the bookmaker. Consequently, it is submitted that the bookmaker had no income whatsoever from the bets placed at that time.

The court in *Ceraso* believed the legislative history of 18 USC §1955 indicated that Congress intended gross revenue to mean amount wagered. Senator Hruska was quoted:

> "Any *bookmaking or numbers operation which does more than $2,000.00 in business in one day* . . . must have a substantial adverse effect in the flow of moneys and goods in interstate commerce. (Emphasis by the Court) 115 Cong. Rec. 10736 (1969)" 467 F.2d 657.

As was pointed out above, the "flow of moneys and goods in interstate commerce" cannot be affected until the bookmaker receives money. Furthermore, "doing more than $2,000.00 in business in one day" can hardly be considered clear evidence of Congressional intent. True, it does seem to rule out the interpretation of gross revenue as profits, but it offers no support for the "amount wagered" interpretation either. If anything, it supports Petitioners' claim that gross revenue is winnings, i.e., money paid or owed to the bookmaker.[5]

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5. Additional support for Petitioners' view of the legislative intent can be found in the "Statement of Findings and Purpose" which serves as the preamble to the "Organized Crime Control Act of 1970", wherein it is provided:

This claim is more easily understood by reflecting on an analogy. If a supermarket grosses $2,000.00 or does $2,000.00 in business in a single day (this is the language used by Congress in discussing gross revenue with regard to 18 USC §1955), it is generally understood that, as a result of purchases by customers on that day, the supermarket has received or is owed $2,000.00. The grocer has expenses, and even though they may exceed $2,000.00, he is still said to have a gross revenue of $2,000.00 for that day. Likewise, a bookmaker who "does more than $2,000.00 in business" has received or is owed $2,000.00 as a result of the wagers he has won on a particular day. The bookmaker too has expenses, most notably the wagers he has lost.

In other words, the bookmaker is owed nothing, and he owes nothing at the time when the wagers are

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> "The Congress finds that: (1) organized crime in the United States is a highly sophisticated, diversified and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling . . . (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes . . ." §1 of Public Law 91-452.

The "activity that annually drains billions of dollars from America's economy" is not, and cannot be, the mere placing of wagers. A wager itself does not have any relation to "money obtained", nor does it, without more, produce money so "used". The above-recited Congressional findings presuppose the actual flow or exchange of monies such that the interstate commerce power is triggered. However, placing a wager does not necessarily result in the flow or exchange of monies.

made. As a result of the outcome of the sports contests upon which the wagers are made, the bookmaker may win some money and may lose some money. If, for example, he wins $3,000.00 in wagers and loses $10,000.00, he still has income, or gross revenue, of $3,000.00. Gross revenue, quite simply, is the amount of money the bookmaker is entitled to receive on account of the wagers he has won.

In other instances, Congress can and has used specific unequivocal language to refer to the total amount wagered. 26 USC §4401, for example, states:

> "There shall be imposed on wagers . . . an excise tax equal to two percent of the amount thereof."

The tax is clearly levied against the amount wagered. On the other hand, 18 USC §1955(b)(iii) requires as an element of an illegal gambling business "a gross revenue of $2,000.00 in any single day". If Congress had meant the $2,000.00 figure to represent the total amount wagered, it would have provided that the gambling business "accept wagers totalling $2,000.00 in any single day". It did not do so.

In the case at bar, the government failed to prove that the subject gambling business had a gross revenue of $2,000.00 or more on any one day. No where in the record did they tally the amount of money won by the bookmakers even though the method of computation is simple, as demonstrated by the government expert on cross-examination. The government can only point to the amount of money wagered which cannot constitute the amount received or "income". Accordingly,

the evidence is insufficient and fails to establish a critical fact alleged in each count of the indictment.[6]

II.

Petitioners Joseph and Norma Iannelli also pose a question to this Court concerning whether a court may consider affidavits submitted in connection with a previous application in determining if a government application for the interception of wire communications establishes the need for interception required by 18 U.S.C. §2518(1)(c) and (3)(c).

In this case, there were two wiretap applications. The first was submitted on June 13, 1975 and incorporated affidavits of FBI Agent William Paul Corvin and Postal Inspector Nicholas Cook. The second application was submitted on July 23, 1975 and incorporated the affidavit of FBI Agent Thomas J. Coyle. In addition, that application also incorporated the June 13 affidavits of Corvin and Cook.

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6. In light of the above argument, Petitioners also maintain that the trial court's instruction to the jury on the gross revenue requirement was erroneous. The court stated:

> "For example, the requirement of $2,000.00. You should consider the amount of the total wagers accepted in any one day, regardless of how the balance sheet came out at the end of the day, or regardless of whether the games were actually played or not, but the total amounts actually booked and registered determines that, and you have heard the evidence as to the amount of that." (p. 645a)

See, also, p. 625a of the judge's charge. An objection to said instruction was raised below and overruled. p. 661a.

The court's consideration of the June 13 affidavits in connection with the July 23 application was clearly erroneous. Since the Coyle affidavit alone did not establish the need for interception required by 18 U.S.C. 2518(1)(c), all of the evidence seized pursuant to the July 23 application should have been suppressed.

The standard which must be met in establishing the need for interception is set forth in §2518(1)(c), which requires that each application must include:

> "A full and complete statement as to whether or not other investigative procedures have been tried and failed, or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

The standard is further reflected in §2518(3)(c), which provides that in issuing the order, the judge shall determine whether:

> "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

Through this statute, the government is thus required to make some preliminary assurance that electronic surveillance will be used only in such instances where other methods of investigation have failed or, for reasons which are specified and reasonable, are likely to fail. The Third Circuit Court of Appeals stated its understanding of this requirement as follows:

> "Congress has established this additional precondition to obtaining a §2518 authorization in order to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures

> (are) not to be routinely employed as the initial step in criminal investigations. '(W)iretapping is not (to be) resorted to in situations where traditional investigative techniques suffice to expose the crime.'" *United States v. Vento,* 533 F.2d 838, 849 (3d Cir. 1976).

A. The Coyle Affidavit Alone Is Not Sufficient to Show the Government's Compliance With §2518(1)(c) and (3)(c).

In relevant part, the Coyle Affidavit (July 23, 1975) sets forth:

> "My experience, and the experience of other Special Agents of the Federal Bureau of Investigation, who have conducted investigations of illegal gambling operations and with whom affiant has consulted, has shown that gambling raids and searches of gamblers in their gambling establishment have not, in the past, resulted in the gathering of sufficient physical or other evidence to prove all elements of the offenses they have committed. Through my experience and the experience of other Special Agents who have worked on gambling cases, I have found that gamblers frequently do not keep complete records and if such records are maintained, gamblers immediately prior to or during a physical search frequently destroy these records by dissolving them in water or by burning such records with specially designed flash paper. Additionally, records that have been seized in past gambling cases have generally been insufficient to establish the involvement of all the conspirators in the offense, the periods of operation which the seized records re-

flect, the gross amount of wagers accepted in a single day (because such records are difficult to interpret), the arrangements for payoffs for winning bets, and the methods of transfers in payments for receipt of gambling information." Coyle Affidavit, pp. 27a-28a.

The Coyle affidavit thus confines itself to a discussion of *one* investigative technique—search and seizure. Moreover, the discussion is limited to "prior agent experience" and contains no facts which would enable the district judge, apart from the agent's experiences, to make an independent determination.

The affidavit does not reveal whether or not any other investigative procedures have been tried or even contemplated, much less an explanation "why normal investigative procedures have been tried and have failed and reasonably appear unlikely to succeed if continued". There is no discussion of surveillance, undercover operations or the use of live witnesses.

Agent Coyle states: "... surveillance, undercover operations and other means cannot disclose what is said over the telephones—the means by which this illegal gambling business carries on its day-to-day operation." Coyle affidavit, p. 77a. In essence, the government is asserting that the use of wiretaps is easier than other investigative techniques since the gambling organization conducts its business by telephone. While this may be true, it alone cannot serve to discharge the requirement of §2519(1)(c). As the Ninth Circuit has said:

> "It is no doubt true that experienced agents at the outset of an investigation can anticipate with a fair degree of accuracy whether ordinary techniques will fail or prove to be 'too dangerous'. To delay the wiretap order while ordinary techniques are employed or to undertake to educate a district judge to enable him to appreciate their level of experience no doubt appears to such agents to be a waste of time and resources. Their perception may be accurate, but Congress has deprived it of decisive influence. The particularized showing here described is necessary. The district judge, not the agents, must determine whether the command of Congress has been obeyed." *U. S. v. Spagnuolo*, 549 F.2d 705, 710-711 (9th Cir. 1977).

It is clear that the Coyle affidavit standing alone is insufficient to support the need for interception required by §2518(1)(c) and (3)(c).

B. The Previous Affidavits May Not Be Used in Support of the Present Application.

Of significance is the fact that the June 13 application sought to intercept telephone communications between entirely different individuals and over entirely different telephones than the July 23 application.[7] Therefore, the June 13 affidavits do not deal at all with the targets of the July 23 application—Cammarata and co-defendant Harkins. The previous affidavits, in terms of §2518(1)(c) and (3)(c), have no factual relation to

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7. The June 13 application sought an order to intercept the wire communications of Sidney J. Elcock, Evans Howard, Harry Zelkowitz, Louis J. Kolarich and Joseph Iannelli at four separate telephones located in the post office in addition to the home phones of Iannelli and Elcock. The July 23 application sought an order to intercept the wire communications of James Cammarata and Harkins at telephones located in their residence.

Cammarata and Harkins. The most that can be said of the prior affidavits, in terms of the present application, is that they relate to the court the general experience of agents in conducting prior gambling investigations.

This issue arose in *Calhoun v. Maryland,* 367 A.2d 40 (1977).[8] In holding that a valid prior affidavit could not be used to cure a present defective affidavit, the court stated:

> "What the state, in the instant case, did was to make an application supported by a valid affidavit and obtain an order thereon for a location on East Baltimore Street. Thereafter, it sought a new order for a location on McClean Boulevard, and in the affidavit in support thereof, attempted to fuse the allegations of the first affidavit, that normal investigative procedures would not be successfull, by incorporating the prior affidavit by reference. If such a procedure were allowed, it is possible that the police could obtain a valid order based on a legally sufficient affidavit and then in a whole series of new applications incorporate the prior affidavit by reference so as to comply superficially with 18 USC §1528." *Calhoun v. Maryland, supra,* at pp. 45-46.

The consideration of the June 13 affidavits was a flagrant violation of the statute, which requires strict adherence to its procedural steps, *U. S. v. Giordano,* 416 U.S. 505 (1974), and to Fourth Amendment precepts in general.

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8. While *Calhoun* is a state court decision, it is of precedential value because while the Act allows for concurrent state regulation, any such state statute is subject, at a minimum, to the requirements of the federal Act. 18 U.S.C. §2516(2).

A better case for consideration of the June 13 affidavits could be made if those affidavits dealt at all with the targets of the July 23 application. However, since they did not, the affidavits were totally irrelevant and should not have been considered by the court.

Because the Coyle affidavit alone is insufficient to comply with §2518(1)(c) and (3)(c), the court below erred in refusing Petitioners' motion to suppress evidence.

CONCLUSION

For the reasons discussed above, petitioners Joseph and Norma Iannelli request a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit in this matter.

Respectfully submitted,

THOMAS A. LIVINGSTON
DENNIS J. CLARK

Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2005

UNITED STATES OF AMERICA
v.
IANNELLI, JOSEPH a/k/a Joe a/k/a "45"
Joseph Iannelli,
Appellant
(Criminal No. 77-28-1, W.D. of Pa.)

No. 77-2006

UNITED STATES OF AMERICA
v.
IANNELLI, NORMA a/k/a Norm a/k/a "45"
Norma Iannelli,
Appellant
(Criminal No. 77-28-2, W.D. of Pa.)

Submitted Under Third Circuit Rule 12(6)
February 15, 1978

Before SEITZ, *Chief Judge,* ROSENN and GARTH,
Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by the appellants, to-wit, (1) that the district court erred in refusing the defendants' motions to suppress evidence obtained through the interception of wire communications; (2) that the evidence pertaining to defendant Jean Liebert was insufficient to sustain her conviction since the government failed to prove that there was an exchange of lay-off wagers and other gambling information between Liebert and the Harkins-Iannelli business; (3) that the district court erred in instructing the jury that it may convict a person of violating §1955 if it finds that an independent bookmaker places or accepts lay-off wagers from another independent bookmaker; (4) that the evidence was insufficient to sustain the convicition as to defendants in that the government failed to prove the gambling business had a gross revenue of $2,000 on any single day as alleged in the indictment; and (5) that appellants' sentences should be vacated and the case remanded to the district court for resentencing because the district court did not state its reasons for the particular sentences imposed; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,
SEITZ
Chief Judge

Attest:
THOMAS F. QUINN
Clerk

February 22, 1978

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-2005/6

UNITED STATES OF AMERICA
v.
IANNELLI, JOSEPH a/k/a Joe a/k/a "45"
Joseph Iannelli, Appellant
UNITED STATES OF AMERICA
v.
IANNELLI, NORMA a/k/a Norm a/k/a "45"
Norma Iannelli, Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, and HIGGINBOTHAM, *Circuit Judges*.

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,
COLLINS J. SEITZ
Chief Judge

March 22, 1978

APPENDIX C

18 U.S.C. §1955:

§1955. PROHIBITION OF ILLEGAL GAMBLING BUSINESSES

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling

business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forefitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organiaztion exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross re-

ceipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

Added Pub.L 91-452, Title VIII, §803(a), Oct. 15, 1970, 84 Stat. 937.

18 U.S.C. §2518(1)(c) and (3)(c):

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon the oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * *

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

* * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception or wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

* * *

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;